Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1420

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and THE BEACON MUTUAL INDEMNITY COMPANY,

Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 13, 1977

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CITATIONS

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No._____

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

v.

ARTHUR ANDERSEN & CO., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, respondents in the Court below and plaintiffs in the District Court, pray that a writ of certiorari issue to review or correct the writ of mandamus directed to the United States District Court for the Southern District of New York (Hon. Henry F. Werker) by the United States Court of Appeals for the Second Circuit on April 12, 1977.

OPINIONS BELOW

The opinion of the United States District Court

for the Southern District of New York (Hon. Henry F. Werker), determining that that Court should charge a jury, then deliberating, that the jury might return a verdict as to certain state-law claims upon the agreement of five-sixths of the jurors, is reproduced as Exhibit A hereto. It has not been officially reported.

The order of the United States Court of Appeals for the Second Circuit issuing a writ of mandamus to the District Court directing that such charge not be given, and its opinion in connection therewith, is reproduced as Exhibit B hereto. It has not been officially reported.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The order of the Court of Appeals was entered on April 12, 1977.

QUESTION PRESENTED

Did the Court of Appeals exceed its authority under 28 U.S.C. § 1651(a) in issuing a writ of mandamus to the District Court merely because it disapproved of a jury charge which that Court proposed to give?

STATUTE INVOLVED

The statute involved herein is 28 U.S.C. § 1651(a) under which "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

After a six-and-a-half month trial in the United States District Court for the Southern District of New York, in an action brought by petitioners on both federal law claims and pendent state law claims, the case was submitted to the jury on March 29, 1977, under a charge that required any verdict to be unanimous. Several days thereafter, and after some indication that the jury might be deadlocked, the District Judge, upon application by petitioners, determined to give a supplemental jury instruction to the effect that the jury would be permitted, in accordance with the law of the forum state, to reach a verdict on petitioners' state law claims by a five-sixths majority. The District Judge wrote a carefully reasoned opinion* in support of this decision, relying

* The District Judge's opinion appears as Exhibit A hereto.

upon recent "jury" decisions of this Court, notably Colgrove v. Battin 413 U.S. 149 (1973), and upon the "Erie" doctrine. Thereafter, the District Court orally modified its opinion to add, as an alternative ground for decision, Rule 83 of the Federal Rules of Civil Procedure and Rule 15 of the Civil Rules of the United States District Court for the Southern District of New York (providing for use of New York State procedure in the District Court's discretion in the absence of a governing federal rule). Pursuant to 28 U.S.C. § 1292(b), the District Judge certified the question of the correctness of his ruling for interlocutory review by the Court of Appeals, and stayed the giving of the supplemental charge pending application to the Court of Appeals by the respondents.*

On Monday, April 11, respondents herein (petitioners-defendants below) filed with the Court of Appeals their Joint Petition for Leave to Appeal under § 1292(b) in which they asked, in the alternative, for the issuance of a writ of mandamus or prohibition directed to the District Judge

* The District Court's certificate appears as Exhibit B in Section II of the Appendix to petitioners' motion for expedited consideration, filed herewith (the "Appendix").

(the "Joint Petition"). The Joint Petition did not specifically brief either the availability of § 1292(b) jurisdiction or the propriety of the issuance of an extraordinary writ.*

On Tuesday morning, April 12, petitioners filed their Answer to the Joint Petition, not only setting forth their view that the proposed supplemental charge was entirely proper, but also demonstrating that the Court of Appeals could not properly take jurisdiction under § 1292(b) because a decision on the certified question would not "materially advance the ultimate termination of the litigation," as that statute requires.** Petitioners further pointed out to the Court of Appeals that there was absolutely no need for interlocutory review, and that respondents would

* The Joint Petition and the Appendix thereto appears as Sections II and III of the Appendix hereto.

** A copy of petitioners' Answer in the Court of Appeals (the "Answer") appears as Section III of the Appendix. Exhibit A to the Answer, additional pages from the trial transcript not included in the Appendix to the Joint Petition, contains (at pp. 14132-34, 14141-42) supplemental reasons in support of the District Court's opinion, and the District Court's adoption thereof.

not be prejudiced — and petitioners would be — if that Court by-passed normal appellate procedures. See Point I of the Answer.

At the close of argument, the panel announced from the bench that it was issuing the extraordinary writ ordering the District Court not to give the proposed charge.

In its opinion, a copy of which is annexed as Exhibit B hereto, the panel stated that the proposed charge could not be given. This decision rested on an erroneous reading of Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958). The Court of Appeals also held that, so far as the District Judge might have had discretion under a local rule, his decision to give the charge threatened the integrity of the jury's deliberations and risked jury confusion because of the earlier unanimity charge.

Following the decision of the Court of Appeals, the respondents moved in the District Court that the jury be discharged. This motion was denied, and the jurors were instructed to continue their deliberations.

They are doing so now.*

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN ISSUING A WRIT OF MANDAMUS.

The action of the Court of Appeals herein was completely inconsistent with this Court's decisions in Will v. United States, 389 U.S. 90 (1967), and Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943). The Court below has committed the fundamental error of issuing an extraordinary writ when the worst that could be said of the District Court's action is that it might have been erroneous as a matter of law. Will and Roche specifically forbid the use of mandamus, and the by-passing of ordinary appellate procedures, for such a purpose.

* Because the relief sought by the present petition — the giving of the proposed charge to the jury — will be rendered unavailable if the Court of Appeals is not reversed before the jury is discharged, petitioners are filing herewith a motion for expedited consideration of this petition. As is set forth in said motion, it is urgently necessary that this Court review the Court of Appeals' action in the immediate future.

See 389 U.S. at 95-99, 103-04; 319 U.S. at 26. Thus the action of the Court of Appeals is contrary to the most basic principles of the proper use of appellate power and to principles of sound judicial administration generally.

Moreover, in the present case, regular appellate review is only a matter of weeks, or at most months away: it must be emphasized that the jury is now actually deliberating, so that a verdict -- if one can be reached -- can be reviewed in the ordinary course in the very near future.* This is not a case where the District Court's action is such that it can never otherwise be reviewed, or where regular review lies only a long distance in the future. Compare In re Turpentine & Rosin Factors, Inc., 238 F.2d 458, 460 (5th Cir. 1956). Plainly, mandamus is improper under such circumstances. In re Turpentine & Rosin Factors, Inc., supra.

* Should the jury still be unable to reach a verdict, the issue of the propriety of the proposed charge will never have had to be decided by the Court of Appeals.

All the more is this true when the action of the District Court to which the writ was directed -- the giving of a supplemental jury charge -- is the very type of action to which careful appellate consideration is normally given in the regular appeal process.

For the foregoing reasons, respondents cannot possibly be prejudiced by reversal of the Court of Appeals by this Court: they have the right to appeal in the regular course should the jury return a verdict.

Indeed, the practical effect of the Court of Appeals' behavior is to frustrate the regular appellate process; mandamus here is not "in aid of" its jurisdiction as the "All Writs" Act requires. 28 U.S.C. § 1651 (a). Thus, by virtue of the issuance of the writ, the District Court is of course precluded from giving the proposed supplemental charge. But it follows that, if the writ stands, the complex and difficult legal issues raised by the proposed charge -- i.e., the status of the requirement of civil jury unanimity in the federal District Courts; the applicability of the principles of the "Erie-Byrd-Hanna" line of cases to a state statute

permitting non-unanimous verdicts; the discretion of the district courts under local rules — will never be given careful consideration by the Court of Appeals, for no one can pretend that the hurried, limited consideration given to the Joint Petition below merits that description.

Further, although respondents would not be prejudiced by the denial of an extraordinary writ, petitioners are gravely prejudiced by the issuance thereof. For the action of the Court of Appeals denies petitioners review by this Court of the legal questions raised by the proposed charge: if the proposed charge is not given — as it will not be unless this Court reverses the Court of Appeals — that Court will in effect have become the court of last resort.

Finally, the use of mandamus is utterly improper here because, under the familiar and well-settled test for its issuance, it simply cannot be said that the action of the District Court presented "exceptional circumstances amounting to a judicial 'usurpation of power'. . ." Will v. United States, supra, 389 U.S.

at 95. Thus the legal conclusion reached by the District Court, though it may be erroneous, is supported by substantial judicial and textual authority, including opinions of this Court. See, e.g., Colgrove v. Battin, 413 U.S. 149 (1973) (Seventh Amendment does not preserve common-law "incidents" of jury trial); Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion) (Sixth Amendment does not require jury unanimity in State criminal trials); Johnson v. Louisiana, 406 U.S. 356 (1972) (plurality opinion) (due process does not require jury unanimity in State criminal trials); Byrd v. Blue Ridge Rural Electric Cooperative, Inc., supra; Wieser v. Chrysler Motors Corp., 69 F.R.D. 97 (E.D.N.Y. 1975) (Seventh Amendment does not require unanimity; majority verdict in accordance with state procedure may be appropriate in diversity case); Wright, Law of Federal Courts § 94, at 463 n.5 (3d ed. 1976) (while "there are no recent [Supreme Court] opinions on the requirement of unanimity in civil cases, . . . if the issue should arise, it seems very likely that the Court would hold that unanimity is not required") (emphasis added). We are not arguing now the merits of the District Judge's decision; but it seems almost too

plain for argument that, with such substantial authority behind it, his opinion and order are simply not the stuff of which mandamus is made.*

However, we note that, far from castigating the District Court, the Court of Appeals should, if it acted at all, have sustained him. Thus the Court of Appeals simply failed to give any credit at all to the District Court's imaginative attempt — fully consistent with recent decisions of this Court designed to assure that the jury remains a useful instrument in the administration of justice, and not a hindrance thereto — to salvage a verdict from a six-and-one-half month trial. The Court of Appeals ignored that the Byrd

* We do not have the Court of Appeals' views on why Will v. United States does not control, since it did not even cite that case. See Exhibit B hereto. However, we note that no serious contention can be made that its action was proper under the so-called "supervisory mandamus" doctrine recognized in Schlagenhauf v. Holder, 379 U.S. 104 (1964), and La Buy v. Howes Leather Co., 352 U.S. 249 (1957). Thus there is no showing here either of a "studied disregard of the limitations placed upon the district courts by the federal rules", Will v. United States, supra, 389 U.S. at 100 (discussing La Buy) or of a "persistent disregard of the federal rules," id. at 104 n.22 (discussing Schlagenhauf). All that has happened is that a district judge has issued a carefully written opinion with which the Court of Appeals disagrees. But the Court of Appeals will get its turn in due course; here it has not "supervised" the District Court but improperly intruded into that Court's province.

case specifically and unmistakably requires that state law be followed on state law claims even if it is denominated procedural, see 356 U.S. at 536-37 — assuming, as the District Court held was true here, no countervailing Federal Rule or strong federal policy. And the Court of Appeals cavalierly, on a hurry-up basis, substituted its judgment for that of the District Court on proper control of a jury which the District Court, not the Court of Appeals, has lived with through more than half a year of trial.

In sum, it is the Court of Appeals, not the District Court, which has overstepped its limits here. In the interest of preserving the proper division of responsibilities between trial and appellate courts in the federal system, this Court must reverse the Court of Appeals.

Conclusion

For the reasons above stated, this Court should (a) grant the instant petition on an expedited basis, (b) reverse the Court of Appeals, and (c) authorize

the District Court to deliver the supplemental charge which perceives the law as it is to that Court.

Respectfully submitted,

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April 13, 1977

Exhibits

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and the BEACON MUTUAL INDEMNITY COMPANY,

Plaintiffs,

- against -

ARTHUR ANDERSEN AND COMPANY,

Defendant and Third-Party Plaintiff,

- against -

JOSEPH A. BONURA, EMPIRE NATIONAL BANK (as successor in interest to County National Bank), LYNDA DICK as Executrix of the Estate of Jack R. Dick, and HERMAN L. MECKLER,

Third-Party Defendants,

and

ARISTOCRAT ANGUS RANCH, BEN R. HOUSTON, and CHARLES ALEXANDER,

Third-Party Defendants.

OPINION

71 Civ. 4036 (HFW)

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

Plaintiffs brought this action in the United States District Court in 1971 stating two causes of action, one under section 10(b) and rule 10b-5 of the Securities Exchange Act of 1934 for fraud and the other for common law fraud under New York law. The causes of action as originally alleged involved loans

BEST COPY AVAILABLE

made in 1968 and 1969. I have held that only the 1968 loan is within the orbit of the securities law violation. Both the 1968 and 1969 loans were, however, the subject of the pendent common law fraud claims.

After more than five years of discovery and more than six months of trial the case was given to the jury under instructions that a unanimous verdict must be returned upon both the securities law claim and the pendent common law fraud claims.

Judicial economy and the efficient administration of justice dictated the bringing of this action in the federal court. Had plaintiffs brought the actions in New York state court it would have probably been removable to this court. To have brought two actions, one in federal court and the other in state court, would have been wastful of the limited judicial resources in both courts.

The jury has deliberated for six days. There is some evidence of disagreement or "lack of common ground" among them without any indication as to whether the majority is for the plaintiffs or the defendants. Despite this evidence, the jury has nevertheless continued to call for documentary evidence and the reading of certain testimony. Plaintiffs have now moved that the court instruct the jury that it could arrive at a five-sixths verdict at least with respect to the common law fraud claims and possibly with respect to the securities law claim.

I have rejected the suggestion that a five-sixths verdict would apply to the securities law (the federal question) as being inimicable to the existing federal rule with respect to trial by jury. I am further of the opinion that uniformity is desirable with respect to federally created causes of action triable by jury. I do not include diversity cases within this category since in those cases the cause of action exists in the state and only jurisdiction to hear them is conferred.

I am persuaded that with respect to the common law fraud causes of

action stated in the pendent claims the jury may reach a verdict if five-sixths of their number agree.

The policies expressed in the Erie rule as discussed in Hanna v. Plumer, 380 U.S. 460, 467 (1965), are the prevention of the unfairness caused by a different result in the litigation depending upon the jurisdiction in which the case was brought and the prevention of forum shopping. Both of these policies are served here by deferring to the state rule. In an earlier case, Byrd v. Blue Ridge Cooperative, 356 U.S. 525 (1958), the Supreme Court had expanded on the significance of the Erie doctrine in noting that its purpose was not only that "the federal courts in diversity cases respect the definition of state-created rights and obligations by the states courts," Id. at 535, but that it was more broadly,

> "that the federal courts should conform as near as may be — in the absence of other considerations —to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule." Id. at 536-7.

There is a likelihood in this case that a different outcome would prevail depending upon whether this action was brought in state or federal court. In the event that although on a unanimous basis no verdict could be reached but one could be reached if the agreement of only five of the six jurors were required, the trial could conceivably end in a mistrial if brought in federal court, whereas if brought in state court a conclusion would be reached one way or another.

In my view the Erie doctrine as explained and expanded by Hanna and Byrd dictates the application of New York state's rule pursuant to CPLR 4113(a) (McKinney 1963), under which a five-sixths verdict is prescribed for civil cases. In weighing the interests of New York state in favor of having a non-unanimous verdict as against the interests of the federal courts in favor of a unanimous

verdict, no strong countervailing federal policies may be discerned which would require insistence upon the federal rule with respect to the pendent common law claims. On the contrary, the interests behind a unanimous verdict are quite nebulous. By way of contrast, an admirable purpose is served by the state rule, which was enacted to reduce the economic loss of jury disagreement and to obtain a fairer expression of the jury's belief. 1 N.Y. Judicial Council Report 41 (1935).

As a series of Supreme Court cases defining the attributes of trial by jury under the sixth and seventh amendments as applied to the states by reason of the due process clause of the fourteenth amendment has indicated, the significance of the sixth and seventh amendments has been in insuring that the judgment of a cross-section of the community serve as the agent determining guilt or innocence, in the case of a criminal trial, or the verdict, in the case of a civil trial. It is not necessary that all of the trappings of a jury trial as it existed at common law be incorporated in a trial by jury today. The Supreme Court's discussion of the function of the jury in criminal cases in Apodaca v. Oregon, 406 U.S. 404 (1972), highlights the point that no strong federal policy could exist favoring the principal of unanimous jury verdicts in civil trials.[1] As that court said:

> "As we said in Duncan, the purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' Duncan v. Louisiana, 391 U.S., at 156. 'Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen. . . .' Williams v. Florida, supra, at 100. A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in Williams, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries requred to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served."

Id. at 410 (footnote omitted). Furthermore, the Supreme Court noted in Johnson v. Louisiana, 406 U.S. 356 (1972), in upholding a Louisiana statute calling for a jury of twelve with verdict by nine out of twelve in criminal cases where the punishment called for is hard labor, that neither unanimity nor a jury of twelve in a criminal case had ever been held to be a violation of due process. It was further the court's view that, "the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." Id. at 360. In light of these cases, the persuasiveness of earlier Supreme Court cases discussing the requirements of a jury trial in criminal and civil cases is questionable. Cf. American Publishing Co. v. Fisher, 166 U.S. 464 (1897) (invalidating a territorial statute calling for a nine out of twelve verdict because unanimity was deemed an essential feature of trial by jury at common law); Patton v. U.S., 281 U.S. 276 (1930) (stating in dictum that unanimity was essential in a jury trial).

That no strong policy exists in incorporating all of the traditional characteristics of the jury trial in federal court is exemplified by the ruling in Colgrove v. Battin, 413 U.S. 149 (1973),[2] upholding a local rule calling for a jury trial in civil cases with fewer than twelve jurors. The unanimity requirement may not be viewed as being any more significant than a specified number of jurors. The importance of trial by jury lies rather in the fact of a body broadly representing the

community deliberating and issuing a verdict for one party or another. Moreover, the very fact that Rule 48 of the Federal Rules of Civil Procedure provides for a stipulation by the parties to a less than unanimous verdict attests to the fact that no need for an iron-clad policy has been felt. This case is distinguishable in this regard from the one considered by the Supreme Court in Byrd v. Blue Ridge Cooperative where the federal policy found to supersede that of the state was that of favoring decisions by the jury where disputed questions of fact required resolution. Here it can hardly be said that the federal policy is in dispute with that of the state much less that the federal policy is a strong one, Weiser v. Chrysler Motors Corp., 69 F.R.D. 97 (E.D.N.Y. 1975), where the issue is not whether or not a jury or the court is to determine an issue, but whether five or six people will have to decide the verdict.

An argument could be made that the federal courts have an interest in maintaining uniformity of procedure and that this policy should be carried out here. However, in a case such as this one, where the claimant has introduced a pendent state claim into federal court, it is not unreasonable to require him to conform to a rule of the state concerning jury verdicts. Furthermore, no more administrative difficulty would exist in directing a unanimous verdict on some but not all claims than would exist where certain claims must be tried to the court and others to the jury.

Finally, there can be no claim of prejudice to any party here by reason of my decision to direct a five-sixths verdict on plaintiffs' state claims. Counsel would have acted no differently had they known from the start of the trial that this would be the case. Moreover, no party's interest is served by a mistrial in which event enormous resources in time and money will have been expended on a six month trial to no avail. If by reason of my ruling here a verdict is reached by

the jury, the interests of all will have been served because there will have been an end to the litigation with tangible results on the basis of which an appeal may be taken by any losing party.[3]

SO ORDERED.

DATED: New York, New York
April 7, 1977

U. S. D. J.

STATE MUTUAL LIFE ASSURANCE CO. v. ARTHUR ANDERSEN
71 Civ. 4036

NOTES

1. See C. Wright, Law of Federal Courts (3d ed. 1976) § 94 at 463:

"Although it has long been supposed that another of these essential elements of trial by jury was, except as waived by the parties a unanimous verdict of 12 jurors, the Supreme Court has upheld local rules providing for civil juries of fewer than 12, and whether a unanimous verdict is constitutionally required is now a matter of doubt."

In a footnote, Id. n.5, Professor Wright states:

"The Seventh Amendment was held to require a unanimous verdict in American Publishing Co. v. Fisher, 1897, 17 S. Ct. 618, 619, 166 U.S. 464, 468, 51 L.Ed. 1079. More recently the court has held that the Fourteenth Amendment does not require a unanimous verdict in a state criminal case, Apodaca v. Oregon, 1972, 92 S. Ct. 1628, 406 U.S. 404, 32 L. Ed. 2d, 184 but that the Sixth Amendment requires a unanimous verdict in a federal prosecution. There are no recent opinions on the requirement of unanimity in civil cases but if the issue should arise, it seems very likely that the court would hold that unanimity is not required."

2. See cases and authorities cited in n.4, Id.

3. Judge Neaher suggests in Wieser v. Chrysler Motors Corp., 69 F.R.D. at 101, that an issue of the law of the case may be raised by the fact that I have already delivered a charge requiring a unanimous determination by the jury. In the Weiser case, unlike this one, a mistrial had already been declared and the jury dismissed when Judge Neaher made his ruling. In any event, however, my previous ruling to the effect that a unanimous verdict will be required is hereby withdrawn.

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Exhibit B

United States Court of Appeals

SECOND CIRCUIT

77-3020

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 12th day of April , one thousand nine hundred and seventy-seven.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. ROBERT P. ANDERSON

HON. WILLIAM H. MULLIGAN

Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
APR 12 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

In Re: Arthur Anderson & Co., Herman L. Meckler and Empire National Bank
Petitioner
State Mutual Life Insurance Co. of America, et. al.
Plaintiffs-Respondents
v.
Arthur Anderson & Company,
Defendant-Petitioner

77-3020

Arthur Anderson & Co.
Defendant and Third Party
Plaintiff-Petitioner
v.

Empire National Bank (as successor in interest to County National Bank) and Herman L. Meckler,
Third Party Defendants
Petitioners
and
Joseph A. Bonura, et.al.,
Third Party Defendants.

Treating the joint petitions for leave to appeal or for a writ of mandamus or prohibition filed herein with a motion for an expedited appeal as a writ of mandamus and oral argument having been heard thereon,

Upon consideration thereof

It is ordered that said petition for a writ of mandamus be and it hereby is granted.

A. DANIEL FUSARO
Clerk

by Edward J. Guardaro
Edward J. Guardaro
Senior Deputy Clerk

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of April , one thousand nine hundred and seventy-seven.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. ROBERT P. ANDERSON

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

77-3020

In re: ARTHUR ANDERSON & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,
Petitioner,
STATE MUTUAL LIFE INSURANCE CO. OF AMERICA, et al.,
Plaintiffs-Respondents,
v.
ARTHUR ANDERSON & COMPANY,
Defendant-Petitioner.

ARTHUR ANDERSON & CO.,
Defendant and Third Party
Plaintiff-Petitioner
v.
EMPIRE NATIONAL BANK (as successor in interest to County National Bank) and HERMAN L. MECKLER,
Third Party Defendants
Petitioners
and
JOSEPH A. BONURA, et al.,
Third Party Defendants.

This more complete statement of our reasons for granting the petition for writ of mandamus in this case will supersede the extemporaneous remarks delivered from the bench upon conclusion of argument before this panel called into emergency session on Tuesday afternoon, April 12.

Judge Werker rested his extraordinary and unsual action in part on the principle enunciated in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). But, since the state interest involved here is merely avoidance of the burden and cost of a hung jury, it is obviously not a state substantive rule required by Erie to be applied in a federal court diversity suit. The New York rule is primarily procedural, and it is not an "integral" part of any state-created right. Cf. Byrd v. Blue Ridge Elec. Co., 356 U.S. 525 (1968). Accordingly, we are not compelled by New York C.P.L.R. §4113(a) to permit non-unanimous verdicts on pendent state claims.

The respondents urge as an alternative for sustaining Judge Werker's proposed change abandoning the long-established and accepted rule in the federal courts that the verdict must be unanimous, that neither the Seventh Amendment nor Rules 38 and 48, Fed.R.Civ.Pro., compel a rule of unanimity. Thus, they argue, the district judge was free in the sound exercise of his discretion under Rule 83, Fed.R.Civ.Pro., and Southern District Local Rule 15, to apply New York State's 5/6 verdict procedure to this case. But, we cannot accept or endorse the judge's proposal that would abruptly alter the federal rule of unanimity in the mid-stream of the jury's deliberations, especially after the jury was carefully instructed by the judge on two separate occasions that its verdict must be unanimous and after it had continued its deliberations for ten days pursuant to those instructions. Such a deviation from the traditional federal rule of unanimity, utilized by the judge as an expedient to extract a verdict at any cost constituted, in our view, an abuse of discretion.

Indeed, we consider the unprecedented course of action proposed by the district judge, who knew that only a single hold-out survived the delivery of his modified Allen charge, as endangering the integrity of the jury function and the sanctity of deliberations once begun. Moreover, to permit a 5/6 verdict on a state common law claim while preserving the requirement of unanimity on the federal securities law claim risks serious confusion of this jury. In addition, it would be anomalous to observe one district court judge permitting a 5/6 verdict in pendant state claim cases or diversity of citizenship cases while all other judges required unanimity under similar circumstances for a verdict. Accordingly, we believe the issuance of the extraordinary writ of mandamus is clearly called for here.

We need not reach the question whether the Seventh Amendment requires unanimous verdicts in civil cases. Cf. Colgrove v. Battin, 413 U.S. 149 (1973). Nor do we pass on whether a duly enacted district court local rule permitting less-than-unanimous verdicts will withstand constitutional scrutiny. It is our holding that, under the unusual circumstances here, the abrupt departure, especially during the jury's deliberations, from what the district court acknowledged was "the existing federal rule with respect to trial by jury," op. at 2, cannot be condoned.

Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge.

Robert P. Anderson (IRK)
ROBERT P. ANDERSON

William H. Mulligan (IRK)
WILLIAM H. MULLIGAN,
Circuit Judges.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1420

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and THE BEACON MUTUAL INDEMNITY COMPANY,

Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ARTHUR ANDERSEN & CO. AND HERMAN L. MECKLER IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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April 20, 1977

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1420

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and THE BEACON MUTUAL INDEMNITY COMPANY,

Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ARTHUR ANDERSEN & CO. AND HERMAN L. MECKLER IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Hon. Henry F. Werker), dated April 7, 1977, held that although the Court initially charged the jury that it must find unanimously on both the federal and the pendent state law claims, and although the existing federal rule requires that the jury reach unanimity on the federal

claims, the Court could nevertheless supplementally instruct the jury that it need only reach a five-sixths verdict on the pendent state law claims. The opinion of the District Court has not been officially reported and is reproduced as Exhibit A to the Petition.

The opinion and order of the United States Court of Appeals for the Second Circuit held that "under the unusual circumstances here, the abrupt departure, especially during the jury's deliberations, from what the district court acknowledged was 'the existing federal rule with respect to trial by jury,' op. at 2, cannot be condoned," and issued the writ of mandamus. The opinion of the Court of Appeals has not been officially reported and is reproduced as Exhibit B to the Petition.

QUESTION PRESENTED

Did the Court of Appeals properly exercise its discretion in issuing a writ of mandamus which prohibited the District Court's attempt, after ten days of deliberations, "to extract a verdict at any cost" by giving a supplemental jury instruction permitting a less than unanimous verdict on the pendent state law claims?

STATEMENT OF THE CASE

This litigation concerns an alleged fraud in the sale of notes representing three loans made by the plaintiffs (petitioners herein) in 1968, 1969 and 1970 to Black Watch Farms, Inc., which was then engaged in the sale of a tax shelter pack-

age involving managed breeding herds of Aberdeen Angus cattle, but which is now bankrupt. Plaintiffs' claims were brought under both the federal securities law (Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10(b)-5 promulgated thereunder), and the New York common law of fraud. There is an additional allegation that respondent Empire National Bank breached a duty of disclosure arising from a fiduciary relationship.

The state law claims were before the District Court solely under the doctrine of pendent jurisdiction because they arose from the same operative facts as the federal claims.

After more than six months of trial, the case was given to the six-member jury under repeated and clear instructions that the jury must return a unanimous verdict on both the securities law claims and the pendent state law claims. (Trial Transcript [Tr.] 13,987, 13,989, 13,995)

On April 4, 1977 the fifth day of its deliberations, the jury indicated in a note to the District Court that "it will be impossible to arrive at a unanimous decision." (Tr. 14,072) The District Court then proceeded to give the jury a modified Allen charge which reiterated that the jury must unanimously agree upon a verdict. (Tr. 14,077-81)

On the next day, the sixth day of deliberations, the jury sent another note to the District Court which indicated that the jury was deadlocked. (Tr. 14,090) Petitioners thereupon applied to the District Court to have the jury in-

structed that as to the pendent state law causes of action, the jury verdict need not be unanimous, and that they could return a verdict on any or all of the pendent state law claims if only five jurors agreed. On April 7, 1977, the District Court, despite the strenuous objection of the defendants below (respondents herein), ruled that it would give the instruction requested by petitioners.

Thus, with one bold, but swift, stroke of a pen, the District Court indicated its intention to brush aside 200 years of precedent, custom and constitutional protection which had been consistently followed by the entire federal judiciary system.

The District Court itself recognized the extreme and unorthodox nature of the action it proposed to take, and suggested to respondents that they seek immediate appellate review either pursuant to 28 U.S.C. § 1292(b)* or through application to the Second Circuit for a writ of mandamus. (Tr. 14,122)**

It was in the context of this radical, sweeping departure from established precedent that respondents sought, and were granted, a proper writ of mandamus from the Court of Appeals for the Second Circuit, in order to avoid irreparable harm and preserve their federal right to a unanimous jury verdict.

---

*The District Court certified a controlling question, pursuant to 28 U.S.C. § 1292(b) on April 11, 1977. (See Exhibit B to Part II of petitioners' Appendix.)

**The Second Circuit in its order granting mandamus specifically treated the petition for leave to appeal or for a writ of mandamus or prohibition as a petition for a writ of mandamus.

The District Court in its opinion held that unanimity was required under "the existing federal rule with respect to trial by jury." Opinion, 2. However, the District Court then declined to apply the federal rule to plaintiffs' pendent state law claims and instead applied New York's procedural rule permitting five-sixths verdicts. The District Court justified its "extraordinary and unusual action" (Court of Appeals, Op. 1) on an erroneous reading and application of the Erie-Byrd-Hanna line of cases. As the Court of Appeals correctly pointed out, there was no substantive state interest to compel application of the clearly procedural New York C.P.L.R. § 4113(a), (McKinney's 1963), which permits non-unanimous (five-sixths) verdicts in state courts.

The Court of Appeals recognized the grave potential for prejudice which could result from the District Court's abrupt reversal of both generally accepted federal jury practice, and the very instructions under which this jury had been deliberating for ten days at the time the Circuit Court ruled.*

The Court of Appeals held that the District Court clearly abused its discretion in deviating from the traditional federal rule merely as an "expedient to extract a verdict at any cost." (Court of Appeals, Op. 1).

The Court of Appeals viewed the District Court's unprecedented action as "endangering the integrity of the jury

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*The jury will be in its 16th day of deliberations concerning this case by the time this Court receives this memorandum.

function and the sanctity of deliberations once begun." (Court of Appeals, Op. 2). As the Court of Appeals correctly observed, to allow the District Court to charge a different standard of consensus for a verdict on the state law claims from the standard on the federal claims "risks serious confusion of this jury," and would lead to the anomalous situation where different district judges could set different standards for verdicts in direct contravention of the principles of uniformity which underlie the federal judicial system. (Court of Appeals, Op. 2).

ARGUMENT

POINT I

THE COURT OF APPEALS PROPERLY ISSUED THE WRIT IN ORDER TO PROTECT RESPONDENTS' RIGHT TO TRIAL BY JURY

The sole question presented by the Petition is whether, under the circumstances here, the Court of Appeals properly exercised its discretion in issuing the writ of mandamus. As Justice Marshall stated in writing for this Court in Kerr v. United States District Court, 426 U.S. 394, 403 (1976), "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed."

Based upon the unique and compelling facts present here, it is clear that the Court of Appeals properly exercised that discretion because the District Court's decision and order constituted an eleventh hour attempt to tamper with respondents'

right to trial by jury. Thus, issuance of the writ served a "vital corrective and didactic function." Will v. United States, 389 U.S. 90, 107 (1967).

In analogous situations, the courts have specifically recognized the propriety of a writ of mandamus. Thus, this Court has held that "the right to grant mandamus to require jury trial where it has been improperly denied is settled." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959). Accord, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), where the availability of mandamus was regarded as too clear to need discussion; and Filmon Process Corp. v. Sirica, 379 F.2d 449 (D.C. Cir. 1967). See also, United States v. Newman, slip opinion, Docket No. 76-3077 (2d Cir. January 25, 1977), where the Second Circuit held that mandamus was appropriate where a district judge attempted an unauthorized modification of the jury selection process which had been adopted by the District Court, sitting en banc. (Attached as Exhibit A.)

The issuance of the writ was clearly proper under the general principles established by this Court in Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976); Schlagenhauf v. Holder, 379 U.S. 104 (1964); and La Buy v. Howes Leather Co., 352 U.S. 249 (1957). See also, Will v. United States, 389 U.S. 90 (1967).

In Schlagenhauf and La Buy, this Court held that a writ of mandamus is appropriate when an action by a district court constitutes a usurpation of power, an abuse of discretion or threatens proper judicial administration in the federal system.

Accord, Will v. United States, supra. All three of these factors were present here.

The District Court's intended supplemental instruction on a five-sixths verdict constituted a clear usurpation of power. The Court of Appeals found that the District Court's "extraordinary and unusual action" in applying New York's procedural rule was in clear contradiction of principles enunciated by this Court in Erie R. R. v. Tompkins, 304 U.S. 64 (1938) and Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958). See also, Hanna v. Plumer, 380 U.S. 460 (1965). Further, neither the Federal Rules of Civil Procedure nor the local rules of the Southern District of New York permit a district court unilaterally to authorize a less than unanimous verdict on state claims brought in federal court; nor have petitioners been able to cite a single case holding that a district judge may unilaterally take such action.*

The District Court's decision to permit a five-sixths verdict on the pendent state claim would also have effectively deprived respondents of their right to a unanimous verdict on the federal claim. The District Court acknowledged in its charge

*Both the District Court and the Court of Appeals recognized that the uniform federal rule on jury verdicts is unanimity. Accordingly, the District Court incorrectly held that it had discretion under Rule 83, Fed. R. Civ. P. and Southern District Local Civil Rule 15 to apply New York's 5/6 verdict procedure to this case.

to the jury that the pendent claim was based on the identical facts as the federal claim.* Thus, a finding for either side on the issue of liability on the state law claim could conceivably carry with it, under principles of res judicata and collateral estoppel, a determination on the common nucleus of operative facts necessary to establish the federal claim as well, even though the jury was unable to arrive at a unanimous verdict. Under such circumstances, respondents' right to a unanimous verdict on the federal claim would be completely subverted. Cf. Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974). This anomalous result would be a perversion of the reasons for permitting pendent claims to be appended onto federal causes of action. See United Mine Workers v. Gibbs, 383 U.S. 715, 726-727 (1966); and Kavit v. A. L. Stamm & Co., 491 F.2d 1176, 1179-80 (2d Cir. 1974). The unacceptable "fluctuating hybridization" of federal and state procedures in federal courts which would result from such a rule should not be permitted. Minn. & St. Louis R.R. v. Bombolis, 241 U.S. 211, 221 (1916).

The action which the District Court proposed to take also constituted a clear abuse of discretion. As the Court of Appeals

*At page 13,952 of the trial transcript, the District Court, in its charge to the jury, stated:

> "As I indicated earlier, plaintiffs' common law claim with respect to the 1968 transaction is based on the identical facts which serve as the basis for plaintiffs' securities laws claim on that transaction, and I will not repeat those facts here."

observed, "[s]uch a deviation from the traditional federal rule of unanimity, utilized by the judge as an expedient to extract a verdict at any cost constituted, in our view, an abuse of discretion." (Court of Appeals, Op. 1). The Court of Appeals further observed that the action contemplated by the District Court would endanger "the integrity of the jury function and the sanctity of deliberations once begun."* (Court of Appeals, Op. 2). It is hard to imagine more compelling reasons for the issuance of a writ of mandamus than those presented here.

Finally, the decision to issue the writ was entirely appropriate under the Court of Appeal's supervisory authority. As this Court stated in La Buy v. Howes Leather Co., supra:

> "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." 352 U.S. at 259-60.

Accord, Schlagenhauf v. Holder, supra 379 U.S. at 111; Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524 (D.C. Cir. 1975). The Court of Appeals properly pointed out:

> "[I]t would be anomalous to observe one district court judge permitting a 5/6 verdict in pendent state claim cases or diversity of citizenship

*Subsequent events have vindicated the sound judgment of the Court of Appeals. Since the mandamus was issued, the jury has continued to deliberate for another six days without further indication of a deadlock. Apparently the majority is examining the views of the minority which might well not have occurred if the 5/6 instruction had been given as contemplated by the District Court.

> cases while all other judges required unanimity under similar circumstances for a verdict. Accordingly, we believe the issuance of the extraordinary writ of mandamus is clearly called for here."*
>
> * * *
>
> "[U]nder the unusual circumstances here, the abrupt departure, especially during the the jury's deliberations, from what the district court acknowledged was 'the existing federal rule with respect to trial by jury,' op. at 2 cannot be condoned."

It is clear, therefore, that the issuance of the writ was an appropriate means of supervisory control to ensure proper judicial administration in the district courts.

In summary, where as here, the action proposed by the District Court constituted a usurpation of power, was a clear abuse of discretion and threatened proper judicial administration, the Court of Appeals was fully justified in issuing a writ of mandamus to prevent such abuse.

POINT II

THE PETITION FOR CERTIORARI FAILS TO MEET THE STANDARDS FOR REVIEW OF RULE 19 OF THE RULES OF THE UNITED STATES SUPREME COURT

The Second Circuit, in issuing the writ of mandamus, expressly declined to reach the questions of whether the Seventh

*It should also be noted that the District Court's action flew squarely in the face of the history of Calendar Rule 22 of the Southern District of New York which provides for panels of six jurors. When Calendar Rule 22 was initially proposed, it provided for five-sixths verdicts. Hon. Thomas F. Croake, Memorandum on the Advisability and Constitutionality of Six Man Juries and 5/6 Verdicts in Civil Cases, 44 N.Y.S.B.J. 385 (1972). However, that portion of the proposed rule was not adopted.

Amendment requires unanimous verdicts in civil cases or whether a duly enacted district court local rule permitting less than unanimous verdicts would be constitutionally permissible. (Court of Appeals, Op. 2) Its decision was based on the unique facts presented below, and is entirely consistent with 200 years of practice in the federal courts. Thus, while raising an issue of importance to petitioners, the petition for certiorari does not present an important question of federal law for review by this Court under the criteria set forth in Rule 19 of this Court's Rules. Accordingly, the petition should be denied.

POINT III

PETITIONERS LACK STANDING TO BRING THIS PETITION

Petitioners lack standing to petition this Court for a writ of certiorari. The writ of mandamus issued by the Second Circuit was directed to Hon. Henry F. Werker, the District Judge. He, not these petitioners, is the aggrieved party and he has not filed any petition nor has he consented that petitioners file on his behalf. Compare, Will v. United States, supra; La Buy v. Howes Leather Co., supra; and Roche v. Evaporated Milk Association, 319 U.S. 21 (1943).

CONCLUSION

Petitioners lack standing; no important federal question is presented; and the issuance of the writ of mandamus was entirely proper and an appropriate exercise of the Court of Appeals' discretion. The petition for certiorari and the motion for expedited consideration should be denied.

Respectfully submitted,

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April 20, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 663—September Term, 1976.

(Argued December 28, 1976 Decided January 25, 1977.)

Docket No. 76-3077

UNITED STATES OF AMERICA,

Petitioner,

v.

HONORABLE JON O. NEWMAN,

Respondent.

Before:

SMITH, ANDERSON and TIMBERS,

Circuit Judges.

Petition for mandamus by the United States Attorney for the District of Connecticut asking this court on review to vacate and set aside the opinion and ruling of the United States District Court for the District of Connecticut, dated October 15, 1976, Jon O. Newman, *Judge*, disallowing four peremptory challenges by the Government and ordering an explicit remedy, on the ground that the Government had adopted a pattern of excessive challenges against veniremen of the Black race.

Petition granted and case remanded.

JOSEPH S. DAVIES, JR., Esq., Department of Justice, Washington, D. C. (Peter C. Dorsey, U. S. Attorney, District of Connecticut, and

Exhibit A

Jerome M. Feit, Esq., Department of Justice, Washington, D. C., on the brief), *for Petitioner.*

Andrew B. Bowman, Federal Public Defender, New Haven, Conn., Peter Goldberger, Asst. Federal Public Defender, and counsel for defendant Margaret Lee Robinson, on the brief), and

John R. Williams, Esq., New Haven, Conn. (and counsel for defendant Patricia Savarese), *for Respondent.*

(Jack Greenberg, Esq., Charles Stephen Ralston, Esq., and Lynn Walker, Esq., New York, New York, on the *Amicus Curiae* brief of The NAACP Legal Defense and Educational Fund, Inc.).

Anderson, *Circuit Judge:*

On April 21, 1976 Margaret Lee Robinson was indicted by a Grand Jury in the United States District Court for the District of Connecticut for the crime of embezzlement of $1,779 from a federally insured bank in violation of 18 U.S.C. §656 and for conspiracy to commit that substantive offense, 18 U.S.C. §371. On the conspiracy count two others, Jethro Brown and Patricia Savarese, were also indicted. The case was assigned for a jury trial to Judge Jon O. Newman and the process of selecting the jury commenced on June 21st. Of the 48 veniremen summoned for jury duty, 40 reported to the court and, after the voir dire and the challenges for cause had been ruled upon, the clerk, at the direction of the court, drew 37 names from the jury box to constitute the jury pool from which the jury panel of

twelve and five alternates[1] were to be drawn. The peremptory challenges were then exercised in accordance with F.R.Crim. P. 24: 7 by the Government and 13 by the defendants. The Government peremptorily challenged three White and four Black veniremen, the latter constituting all of the Black veniremen in the jury pool; and the defense so challenged 13 White veniremen. The public defender for the defense then moved to expunge the Government's peremptory challenge of the four Black veniremen on the ground that their exclusion was an act of invidious discrimination by the United States Attorney.

Judge Newman then inquired of the Government whether it wished to state a non-racial reason for challenging the four Black veniremen in the jury pool. The Government however, replied that it did not, on the ground that inquiry into and disclosure of reasons underlying a peremptory challenge were contrary to the nature and purpose of the peremptory challenge.

The case was then continued to permit the defendants to present a statistical analysis to support their claim. The Federal Public Defender's statistical analysis, filed with the court on August 31, 1976, covers a two-year period June, 1974—June, 1976, during which 72 criminal jury trials (including the present case) were held in the following divisions[2] of the United States District Court: Hartford and New Haven.

---

1 The unusually large number of alternates for what was estimated to be a trial of only a few days, was ordered because the trial itself was not scheduled to go forward until late August.

2 The divisions are set out in Part IV of the Jury Selection Plan for the United States District Court for the District of Connecticut, established by order of the court on September 23, 1968 as amended, which part designates the county or counties from which each seat of court, i.e. Hartford, New Haven, including Waterbury, and Bridgeport will draw its venire for jury service.

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The basic data was compiled by a student intern, who was a senior at the University of Connecticut Law School and who worked as a researcher in the office of the Public Defender. He reported that for the 47 jury trials which took place at the Hartford seat of court, there were for 23 of those trials no Black individuals in the general array; that out of arrays totalling 2519 people,[3] 10 Black persons appeared 75 times. He also said that there were 17 trials in which potential Black jurors, drawn from the jury pool, were eliminated solely by the Government's peremptory challenges; that out of 47 trials, there were 40 trials in which Blacks were either not present in the array or were eliminated by Government challenge; and out of 47 trials studied, Blacks became jurors four times.

3 According to the researcher's report on the Hartford seat of court during the two-year period, there were 47 trials, during 23 of which the "general array" (presumably the jury box with all of the names of persons on the jury list—each name with address on a separate card—inside of the box) contained no name of a Black person. He further reported that out of arrays totalling 2519 people, 10 Black persons appeared 75 times.

In the very next paragraph of the text of this opinion we note that the researcher reported that for the New Haven Division "... in arrays totalling 1591 people, names of Blacks appeared only 54 times." But there is no information reported there or anywhere in the record, about the total number of veniremen in the general arrays, that is, the total number of names in the jury boxes, for any particular period of time. See affidavit of Judge Newman, dated December 14, 1976, at n. 4. What to the researcher is simply an "array" is presumably the number of veniremen ordered by the court to be drawn from the jury box to constitute a pool from which trial juries for one or more cases are drawn. The researcher's large totals of 2519 and 1591, above mentioned as total arrays, are the result of adding all of the jury pools drawn from the box, with one superimposed upon another regardless of the extent to which succeeding pools are composed of the same individuals. When a pool has served its purpose and the trials of the cases for which the pool was drawn have finished, the names are put back in the box and many of the same veniremen are used over and over again. What significance lies in a grand total of all of the used pools is far from clear; and it is even more confusing when there is no way of knowing what veniremen are used, not once, but several times.

The researcher also made studies of the 24 criminal jury trials held during the same two years in the New Haven and Waterbury seats of court, which draw the veniremen from the same areas, and were, therefore, consolidated for the purposes of the survey. He reported that seven out of 24 trials had no Blacks in the general array; that in arrays totalling 1,581 people, Blacks appeared only 54 times; that of the 31 times that Blacks were chosen for the final panel, they were eliminated 12 times by Government challenge and five times by defense challenge; and that 14 Blacks were empanelled as jurors, three in the trials of Black defendants and 11 in the trials of White or Hispanic defendants.

The researcher presented the foregoing data to the Public Defender in the form of an affidavit which was submitted to the district court judge with the Public Defender's brief in support of his motion to strike the Government's jury challenges. The Government, proceeding on the assumption that, for the purposes of this mandamus proceeding, the statistics presented by the defendants were accurate, thereafter filed with the court a short brief with its own statistical analysis of the material in the researcher's affidavit. This affidavit and the Government's representations, made in connection with the statistical analysis, furnished the basic evidentiary materials from which the district court drew the following conclusions of fact:

In trials of Black or Hispanic defendants over the past two years in Hartford, New Haven and Waterbury, 33 Blacks had been included in the final group eligible for jury selection, of which the Government had peremptorily struck 28, resulting in an "exclusion rate" of 84.8%. In cases involving White defendants, 49 Blacks were again in the "final group." The Government challenged 29 of these, resulting in an "exclusion rate" for this category (Blacks struck in the trials of White defendants), of 59.2%. Putting the two "exclusion rates" together (Blacks peremptо-

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rily struck by the Government in the trial of Blacks, White or Hispanics) yielded an overall "exclusion rate" of 69.5%.

On October 15, 1976, Judge Newman filed a memorandum and order. He decided ". . . that the pattern of government peremptory challenges of Black veniremen has now reached an excessive point that calls for the exercise of this court's supervisory power over the conduct of criminal trials in this District." He also said,

> ". . . [T]he high rate of exclusion of Black veniremen and the fact that the rate is higher for trials of minority defendants than White defendants indicates that in a large number of instances Black veniremen were challenged because they were Black. Even in these instances, though the prosecutor's *intention* is clearly to exclude a person because he is Black, the prosecutor may have a *motivation* unrelated to any hostility toward Blacks. He may simply believe that a Black juror may be somewhat partial to a Black defendant." (Footnote omitted.)

The remedy which the district court ordered for the case presently before us, provided ". . . the appropriate remedy is to disallow the challenge of the four Black veniremen and resume the jury selection process with those four names included." As a prospective remedy in addition to the foregoing, the district court further ordered the United States Attorney's Office thereafter ". . . to maintain a record for each criminal trial of the number of Blacks included in the final panels against which peremptory challenges are exercised and the number of Blacks challenged peremptorily by the prosecutor without explanation."

We turn now to a consideration of the evidentiary material, principally the statistical data, presented by the Public Defender on which the factual conclusions of the

district court essentially rest. The district judge said, ". . . I . . . accept as true the facts submitted in the . . . [researcher's] affidavit." These facts are the basis for its ultimate holding that the present system and operation of the Government's peremptory challenges in the District of Connecticut produce an invidiously discriminatory pattern of Black exclusion from the juries in criminal cases in the United States District Court for the District of Connecticut. On review, it is the opinion of this court that the evidence submitted is inadequate in kind and quality and particularly in its relevancy and accuracy to support the conclusions reached as they bear upon the present case,[4] which concerns the rights of one Black defendant and one White defendant on trial in the New Haven Division of the United States District Court for the District of Connecticut. What procedures were being used in selecting jurors in the Hartford Division at that time had no bearing or effect upon the defendants in the case before us.[5]

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4 As the Supreme Court stated in *Swain* v. *Alabama*, 380 U.S. 202, 228 n. 32:

> ". . . Absent a showing of purposeful exclusion of Negroes in the selection of veniremen, which has not been made, the lower proportion of Negroes on the venire list sheds no light whatsoever on the validity of the peremptory strike system or on whether the prosecutor systematically strikes Negroes . . . ."

5 The New Haven Division of the United States District Court for the District of Connecticut, was created under that Court's Plan for the Random Selection of Grand and Petit Jurors, adopted June 21, 1968 in compliance with the Jury Selection and Service Act of 1968, 28 U.S.C. §1861, *et seq.*; and in 1973, after jury verdicts of guilty and convictions for bank robbery in the United States District Court in New Haven, Connecticut, in the New Haven Division, the defendant Jenkins and others claimed that they were denied a fair trial because the procedure used to select the jury panel resulted in discrimination against Negroes, and that there was a substantial disparity between the percentage of Negroes in the community and those on the jury list. They claimed that the disparity of 2-15% or 5-3 violated the Act of 1968

In gathering the evidentiary material having to do with the statistics out of which the facts of the case are found, however, the researcher who marshalled the figures, compiled the information from the jury lists of the Hartford and New Haven Divisions over a two-year period, 1974-76. The result of making a composite of these two Divisions was to make a survey which was accurate for neither the New Haven Division nor the Hartford Division. This merger of statistics and other facts persisted throughout and were instrumental in the formulation of the court's conclusions, even though the instant case is being tried only in the New Haven Division. Of course, several groups of statistics and descriptions of relevant cases and their significant features were separately discussed as matters occurring in the Hartford Division and likewise some matters occurring in the New Haven Division were separately mentioned, but the district court's conclusions and ultimate ruling were based upon the combined studies of both divisions. This course was adopted by the Federal Public Defender for the purpose of strengthening the charge against the office of the United States Attorney for the District of Connecticut that it had exercised its peremptory challenges with the purpose of invidiously discriminating against the use of Black persons as jurors.

and their constitutional rights, and should have been compensated for by selecting jurors from other sources in addition to the voting lists. Judge Newman, the district judge, found the disparity was 6%—3% between the census figures and the voter registration figures for the New Haven Division community and a correction would add only 1 additional Black to 50-60 veniremen which was not substantial enough to deprive the defendants of their rights. On appeal this court affirmed, *United States* v. *Jenkins*, 496 F.2d 57 (2d Cir. 1974), and approved the jury lists and panels selected through the procedures adopted by the United States District Court for the New Haven Division pursuant to the Plan, and there has been no showing in the present action which calls for a different result.

Although the principal issue, raised by this petition for mandamus, concerns the Government's use of its peremptory challenges, sight must not be lost of the fact that it arises out of a federal trial of one Black and one White defendant in the New Haven Division of the United States District Court for the District of Connecticut. This motion is concerned with the rights of these defendants in having a fair and impartial jury and one which represents a fair cross-section of the community. That "community" for the purpose of selecting the jury is the New Haven Division and the court is concerned with the procedures used in that Division for jury selection in the cases of these two accused. By using the present case as the vehicle for an attack upon the United States Attorney's use of peremptory challenges and by proceeding from the recognition of the fact that the United States Attorney performs his functions and duties throughout the entire federal district, the Federal Public Defender has adopted the device of merging jury selection statistics as if juries were selected on a District-wide basis, which they are not. There has been continuously in operation, throughout the period of this case, the "Plan for Random Selection of Grand and Petit Jurors" which divided the District into three divisions, and that Plan is binding upon the district court. It is only the New Haven Division and its procedures for selecting the jury in this case which are relevant. By merging the New Haven Division statistics with those of the Hartford Division, the district court has, as mentioned above, greatly distorted and arbitrarily altered the statistics of the New Haven Division which are, as thus changed, made useless.

In the course of his opinion the district court judge hypothesized a statistically derived, expected rate of Black inclusion on juries, as an acceptable standard. The court said,

"If 12 names are randomly drawn from a group of 28 that includes 2 Blacks, at least one Black would be included in the 12 approximately 68% of the time. This 68% is the expected frequency of juries that would include at least one Black out of the universe composed of final panels with the average number of Blacks that were present in the final panels in this District.[6]

6. Since the prosecutors can challenge peremptorily 6 of the 28 in these final panels, the average of 2 Black jurors per final panel would be reduced to 1.57 (2 — (6/28 x 2)) if the prosecutors' peremptories were exercised neutrally as to race. If 12 names are drawn from a group of 22 (the initial 28 minus the 6 challenged by the prosecutor) that includes, on the average, 1.57 Blacks, the frequency with which at least one Black would be included in the 12 remains at approximately 68%."

Comparing the 68% expected rate with the actual rates in the separate Hartford and New Haven Divisions, it is abundantly clear that the rate experienced in the Hartford Division falls far below the standard, while the New Haven Division's performance substantially equates the standard, and any difference between the New Haven Division and the standard is *de minimis*. The figures are as follows:

The New Haven Division

In New Haven, out of 24 cases analyzed, there were 15 trials with final panels which included an average of 2 Blacks. Of those 15 trials, a Black juror served in 9 trials.

Taking into account the district judge's "expected" rate of 68%, of those 15 trials, Blacks *should* have appeared on juries in 10 cases. *In actual fact, they appeared on 9 juries.* (On one of the 15 final panels, 2 Black veniremen were challenged—one by the Government and the other by the defense. If either had withheld its challenge, the New Haven Division would have met the district court's standard of 68% or 10 trials.)

Translating these figures into percentages, 9 juries with one or more Black members out of 15 final panels, each of which includes an average of 2 Blacks gives a figure of 60% Black participation. The district court's expected percentage rate of Black "inclusion" is 68%.

The result of the above statistics is that the New Haven Division's record, the only one relevant for purposes of this case, compares *very* favorably with the standard hypothesized by the district court.

The Hartford Division

In Hartford, on the other hand, quite a different story is presented. Out of 47 trials analyzed in the Hartford Division, 23 final panels had an average of 2 Blacks per panel. Of those 23 trials, *only 4 had a Black on the jury.* Taking into account the district court's "expected" rate of 68%, *Blacks should have appeared on 15 juries.*

Again translating the Hartford Division figures into percentages so as to point up the comparison, 4 Hartford juries with a Black member out of 23 final panels including an average of 2 Blacks, result in a figure of 17% Black participation. This must be compared with the district court's 68% expected rate of Black "inclusion" on juries.[6]

6 The report on the Hartford Division about the number of Black veniremen who were peremptorily challenged by the Government in connection with several criminal trials presents those challenged as a fairly sizeable group of separate Black individuals, qualified for jury duty but cut off from the opportunity to serve because each had been struck by the Government. A study of the raw data, also furnished by the Federal Public Defender, discloses, however, that one of the group, S. W. Shepherd, was struck no less than six times by the Government, while two others in the group, M. Angus and W. Williams, were struck five times each. Assuming that the researcher's statistical analysis counted each Government peremptory challenge as striking a qualified potential Black juror and disregarding the fact that the same individuals were being challenged several times, it appears, in effect, that three Black veniremen were single-handedly responsible for no less than 16 peremptory chal-

While for several centuries in Anglo-American law inquiry into the reasons prompting an accused defendant to exercise a peremptory challenge have been barred and foreclosed and, likewise in this country for more than a century, such an inquiry or investigation into the reasons inducing a peremptory challenge by the prosecutor has also been precluded, the Supreme Court decision in *Swain* v. *Alabama*, 380 U.S. 202 (1965), though it strongly reiterates the strictures against compelling an inquiry or disclosure of reasons or circumstances prompting or inducing the exercise of a peremptory challenge, 380 U.S. at 220, in Part III of the court opinion, indicates that circumstances *might* exist under which interrogation of a prosecutor as to the reasons for his long, consistently repeated peremptory challenges, exercised solely against Black veniremen to exclude them from sitting on a jury, *might* be pursued. Suffice it to say that in this case the defendants have not shown, by the kind, quantity and quality of evidence which is necessary to sustain the very heavy burden of proof which rests upon them, that they were deprived of due process by the procedures used in selecting a jury for their trial in the present case. Nor under the circumstances did the defendants under any existing law have the right to inquire into and interrogate the prosecutor about his reasons for peremptorily challenging the four Black veniremen in the jury pool. *Swain* v. *Alabama, supra,* is the governing authority on this matter. In that case the Black defendant challenged the trial jury venire and the trial jury subsequently drawn from it, because the prosecutor's six peremptory challenges removed the only available Black members of the venire summoned in the case. In evaluating

lenges against Blacks in the Hartford Division. This counting of the same individuals several times, obscures the reliability and accuracy of the claimed facts and injects confusion into the real significance of the statistics.

the Fourteenth Amendment challenge against the prosecutor's striking of the six Black veniremen in *Swain,* the Court thoroughly reviewed the history and development of the peremptory challenge system and stated, as its basic holding:

> "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." 380 U.S. at 220.

In inviting the United States Attorney in the present case, therefore, to provide the court with a "nonracial" reason for the exercise of his four peremptory challenges against Black veniremen, the district judge erred with respect to *Swain's* standards in two respects: (1) by asking for a reason; and (2) thereby potentially subjecting the Government's exercise of its peremptory challenges to the court's control.

In Part II of the majority opinion in *Swain*, the Court discussed other facets of the nature and function of peremptory challenges, principally in the course of deciding the petitioner's claims that the prosecutor exercised the State's peremptory challenges for the purpose of excluding Negroes from serving on petit juries and for that reason the trial jury array should be stricken. The Court said,

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice."'. *In re Murchison*, 349 U.S. 133, 136. Indeed

the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' *Hayes* v. *Missouri*, 120 U.S. 68, 70.

. . . [The peremptory challenge] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . [V]eniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and

traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. . . .

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. . . ." 380 U.S. at 219-222. (Footnotes omitted.)

The Supreme Court affirmed the action of the State courts in denying the defendant's motion to strike the trial jury array.

In Part III of the Supreme Court's opinion in *Swain*, it engaged in an abstract discussion of how the Court *might* deal with a situation described by the petitioner and claimed by him to have been what actually had occurred in the trial of his case as an example of the historic characteristics of jury trials as they were in Talladega County from 1950 to 1965. In short, the petitioner in *Swain* argued that,

". . . [N]ot only were the Negroes removed by the prosecutor in this case but that there never has been a Negro on a petit jury in either a civil or criminal case in Talladega County and that in criminal cases pros-

ecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself. This systematic practice, it is claimed, is invidious discrimination for which the peremptory system is insufficient justification." 380 U.S. at 222-223.

In speculating on looking into the prosecutor's responsibility for such a state of affairs the Court commented that it would reject the wooden application of various tests devised primarily to determine racial discrimination on the part of jury commissioners who represent the State in quite a different role from that of a prosecutor or defense counsel in exercising peremptory challenges. 380 U.S. at 226-27. The Court went on to say:

"But the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. This is the teaching of *Hernandez* v. *Texas*, 347 U.S. 475; *Norris* v. *Alabama*, 294 U.S. 587; *Patton* v. *Mississippi*, 332 U.S. 463. We see no reason, except for blind application of a proof standard developed in a context where there is no question of state responsibility for the alleged exclusion, why the defendant attacking the prosecutor's systematic use of challenges against Negroes should not be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter." 380 U.S. at 227-28. (Footnote omitted.)

It appears that such an inquiry, however, might only be triggered by proof of a purposeful exclusion of Blacks

from juries over a substantial period of time. In *Swain* the Court said shortly preceding the above quotation:

"... [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. Cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356. In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify." 380 U.S. at 223-224.

The wording of Part III of the opinion does not decide or pretend to decide the hypothetical question presented by the petitioner, which could not be decided by the Court because the issue was not presented by the record. Justice Harlan's concurring opinion (380 U.S. at 228) makes this explicitly clear. At best, it is an educated guess as to the position that the majority of the Court would probably

take if the same question, supported by a record, came before it. Such an occurrence is, of course, not possible. It is, however, interesting to note what circumstances the dissenters in *Swain* felt would justify breaching the otherwise impenetrable wall of non-disclosure of reasons which prompt a peremptory challenge. In the dissenting opinion written by Justice Goldberg, he said,

> ". . . [W]here, as here, a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries over an extended period of time, a prima facie case of the exclusion of Negroes from juries is then made out; that the State, under our settled decisions, is then called upon to show that such exclusion has been brought about 'for some reason other than racial discrimination,' *Patton* v. *Mississippi, supra*, at 466; and that the State wholly fails to meet the prima facie case of systematic and purposeful racial discrimination by showing that it has been accomplished by the use of a peremptory challenge system unless the State also shows that it is not involved in the misuse of such a system to prevent all Negroes from ever sitting on any jury. Such a holding would not interfere with the rights of *defendants* to use peremptories, nor the right of the State to use peremptories as they normally and traditionally have been used.
>
> It would not mean, as the Court's prior decisions, to which I would adhere, make clear, that Negroes are entitled to proportionate representation on a jury. *Cassell* v. *Texas,* supra, at 286-287 (opinion of Mr. Justice Reed). Nor would it mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to

> question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case. Only where systematic exclusion has been shown, would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection." 380 U.S. at 244-245. (Footnote omitted.)

The principal difference between the majority and the dissent is that the former found that the record of the case did not present the question of invidious exclusion from jury service because of race, which the majority postponed until another day, while the latter found that the case presented "a clear record of jury exclusion because of race." Neither suggested or implied that the majority or dissenters favored opening a breach in the protective wall surrounding the exercise of a peremptory challenge for such inconclusive, confusing and unpersuasive reasons as those claimed under the circumstances of the present case.

As the evidence in this case is presented entirely on court or other official records and on affidavits, the reviewing court is in as good a position as was the trial court to pass upon matters of weight and credibility.

We are not satisfied that there is a persuasive showing that the prosecutor, in connection with the present case, had either the motivation or the intention, invidiously to exclude Black persons from serving on juries in the New Haven Division of the United States District Court for the District of Connecticut. What reasons were volunteered for the peremptory challenges by the prosecution were not "wholly unrelated to the outcome of the particular case on trial," *Swain, supra,* 380 U.S. at 224, and "[t]he presumption in any particular case must be that the prosecutor is using the . . . challenges to obtain a fair and impartial jury to try the case before the court." 380 U.S. at 222. As the

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trial court noted, "the prosecutors honestly believed that the striking of Black veniremen would lessen the risk of bias in favor of the defendant and thereby increase the likelihood of a bias free jury." A prosecutor's opinion that particular veniremen are likely to base their conclusions as jurors on emotional factors such as fear, hate, or sympathy or pity rather than upon the evidence in the case in the light of the court's instructions of law, as it is their duty to do, is not an act of invidious racial discrimination. In fact, both the legislative history, 1968 U.S. Code Congressional and Administrative News 1794-95 (90th Cong. 2nd Sess.) and *Swain* make it clear that peremptory challenges may be exercised for purely subjective reasons, "which may very well be imagined or incorrect." Far from seeking to prevent all Blacks from ever sitting on any jury or to exclude all Blacks, qualified to serve as jurors, from serving on juries in civil or criminal cases or to confine them to token representation, the Government's Supplemental Response to the Respondent's statistics, which assumed their accuracy, contended that the adult Black population of Connecticut is 5% of the total, and Blacks constitute 3.15% of the jury lists.[7] They constitute 2.11% of the jurors, and they have served on cases with Black defendants and cases with White defendants. There is, therefore, a disparity of 2.89% which is far below the 10% figure of which the Supreme Court said in *Swain*, "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much

7 In a footnote to the Affidavit submitted to this court, the district judge characterized the origin and relevancy of the 3.15% figure as "somewhat obscure." The figure was derived by establishing the number of Blacks included in general arrays, the total number of people included in those same arrays, and determining the percentage of Blacks in the total. The raw data for this computation came from defendants' figures, as pointed out by the Government in its Supplemental Response.

as 10%." 380 U.S. at 208-209. Moreover, on the defendants' statistics, of the 71 jury trials in criminal cases in the Hartford and New Haven Divisions, during the period of the study (exclusive of the present case) Blacks were members of jury panels 17 times and an alternate once. There has been no finding that there was a "racist" plan or purpose involved in the exercise of peremptory challenges by the Government.[8] Apparently two of the Assistant United States Attorneys in the District of Connecticut are themselves Black.

We conclude that the deprivation of due process claims made by the defendants in this case have no support in law nor do the facts alleged have support in the evidence.

8 Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case warrants it. All of the members of this court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.

The right to peremptory challenges is of great importance, both to the Government and to the defendants—but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury. If, for example, a defendant knows or has a strong suspicion that a particular veniremen is hostile to him or believes the veniremen has strong or militant views which would make it unlikely, in spite of the court's instructions, that the veniremen would give fair and impartial consideration to the case, and yet the defendant does not have available sufficient evidence to prove these disqualifications on a challenge for cause, he can solve the problem with a peremptory challenge. The same considerations apply to a plaintiff or a prosecutor. Once, however, a plaintiff or prosecutor is required to submit to interrogation concerning his reasons for making a peremptory challenge, it will probably not be long before defendants will be required to do likewise. This, in all likelihood, would spell the end of peremptory challenges: and Blacks and other recognizable minority groups would thereby suffer a major loss in the removal of one of the greatest safeguards the law has provided for a fair trial.

It is the opinion of the court that the petition for mandamus should be granted, ordering the rulings of the district court which directed that the names of the four challenged veniremen be restored to the final panel in this case be vacated and set aside. Likewise, this court orders that the direction by the district court to the United States Attorney to maintain statistics on the peremptory challenges by the Government and to report them to the Federal Public Defender where they would be available to the public also be vacated and set aside.

There is no authority for such modifications of the jury selection process, which was by formal vote, adopted by the district court, sitting in banc, and which was subsequently approved by the Council of the Second Circuit. The Federal Rules of neither Civil nor Criminal Procedure authorized these measures which violate the provisions of 28 U.S.C. §1861, *et seq.*

In the present case the novel and drastic remedies prescribed by the district judge, require that this court invoke its power under the All Writs Act, 28 U.S.C. §1651(a), because of the unprecedented assumption of power implicit in decreeing those remedies. *DeBeers Consolidated Mines Ltd.* v. *United States*, 325 U.S. 212, 217 (1945). This has created exceptional circumstances calling for the exercise of supervisory power of this court over the district courts to insure "proper judicial administration in the federal system." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-60 (1957).

Will v. *United States*, 389 U.S. 90 (1967), is not to the contrary. In *Will*, the Supreme Court denied mandamus of a trial court's interlocutory order in a criminal case, noting the strong judicial and legislative policies against Government appeals in criminal cases, which could not be controverted by a liberal use of mandamus as a "substitute

for appeal," 389 U.S. at 96-97. The Court did, however, acknowledge the "vital corrective and didactic function" of mandamus and also wrote:

> "This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution, *Ex parte United States*, 287 U.S. 241 (1932), and where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction. *Ex parte United States*, 242 U.S. 27 (1916). But this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal. We need not decide under what circumstances, if any, such a use of mandamus would be appropriate. It is enough to note that we approach the decision in this case with an awareness of the constitutional precepts that a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offense." 389 U.S. at 97-98.

See also, Note, *Supervisory and Advisory Mandamus, Under the All Writs Act*, 86 Harvard L. Rev. 595, 622 (1973) ("It should be clear, however, that the {*Will*} case . . . does not represent an invalidation of uses of supervisory mandamus authorized by the model described above; on the contrary, it reaffirms the validity of those uses.")

This court has already concluded that the district court's findings of fact and conclusions of law in this case were in error and, in view of its abrupt departure from the statutes and rules, as well as from the District's own Plan for the Random Selection of Grand and Petit Jurors, it is one of those "extraordinary causes" for which "extraordinary

remedies" such as mandamus are appropriate, *Ex Parte Fahey*, 332 U.S. 258, 260 (1947), because the district court's opinion cannot but have an immediate and continuing detrimental impact on the administration of criminal justice in the District of Connecticut. *United States* v. *Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974); *United States* v. *Weinstein*, 452 F.2d 704 (2d Cir. 1971), *cert. denied sub nom Granberger* v. *United States*, 406 U.S. 917 (1972). Among other things it is likely to bring about interminable delays in criminal trials as the result of constant defense challenges to arrays and final panels every time a Black is peremptorily challenged by the United States Attorney's office or in case no Black happens to be drawn on an array or final panel.

The petition for mandamus is granted and the writ may issue accordingly.

On remand the district court will afford the defendants the opportunity, in accordance with the suggestion by Judge Newman in open court on November 29, 1976, to proceed with the present jury after the three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness.

It is so ordered.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1420

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and THE BEACON MUTUAL INDEMNITY COMPANY, Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT EMPIRE NATIONAL BANK IN OPPOSITION

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April 20, 1977

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OPINIONS BELOW

Neither the opinion of the United States District Court (Exhibit A of Petition) nor the opinion of the United States Court of Appeals for the Second Circuit (Exhibit B of Petition) is officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The Petition misstates the nature of the legal issue. In its statement of the question, the Petition implies that the Court of Appeals issued a writ of mandamus "merely because it disapproved of a jury charge which [the District] Court proposed to give." Petition, at 2. The opinion of the Court of Appeals (Exhibit B of Petition) shows the error of the question as framed by Petitioners.

Correctly stated, the issue is: Did the Court of Appeals exceed its authority under 28 U.S.C. §1651(a) in issuing a writ of mandamus to the District Court for the reason that it could not condone, under the unusual circumstances, the abrupt departure, especially during the jury's deliberations, from what the District Court acknowledged was "the existing federal rule with respect to trial by jury"? (See Exhibit A of Petition, at 2; Exhibit B of Petition, at 3).

STATUTE INVOLVED

The pertinent statute is set forth in the Petition at page 3.

STATEMENT OF THE CASE

The underlying action was commenced in 1971 in the United States District Court for the Southern District of New York. The plaintiffs, who are Petitioners in this Court, alleged three basic causes of action: first, a violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1970), and Rule 10b-5, 17 C.F.R. §240.10b-5 (1976), promulgated thereunder; second, common-law fraud; and third, breach of an agent's common-law duty of disclosure to the principal. Respondent Empire National Bank ("Empire") is the only party against which the aforesaid third cause of action is asserted.

The trial by jury of the underlying action began September 13, 1976. The jury, which is still deliberating, consists of six persons, as provided by Calendar Rule 22 of the United States District Court for the Southern District of New York, which states: "A jury for the trial of civil cases shall consist of six persons."

On March 28, 1977 the District Court charged the jury by reading instructions into the record. The trial transcript of the Court's charge is 160 pages in length and a full day was taken to instruct the jury. On several occasions during the charge, the Court directed the jury that any verdict must be reached by unanimous agreement. See Petitioners' Appendix to Motion for Expedited Consideration of Petition for Writ of Certiorari, II, Exhibit "C" ("Appendix to Petitioners' Motion"). Upon retiring on March 29, 1977 to begin deliberation, the Court provided each juror with a printed copy of the charge on which was affixed the juror's name. No motion was made by any party for a less than unanimous verdict until the sixth day of deliberations. At that time, April 5, 1977, the plaintiffs, after long observation of the charged jury, moved for a substitute charge, i.e., that five-sixths of the jury can return a verdict on any claim. On April 7, 1977 the District Court ruled that it would charge the jury that a verdict could be returned on the pendent common-law claims if five of the six jurors reached agreement. Exhibit A of Petition. The District Court recognized, however, that unanimity was required for any verdict on the fundamental, federal claims by virtue of which the District Court had subject matter jurisdiction. Exhibit A of Petition, at 2.

On April 11, 1977, after the District Court certified a question on its proposed five-sixths charge pursuant to 28 U.S.C. §1292(b),* the Respondents filed a petition for leave

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* The Certificate of Hon. Henry F. Werker, U.S.D.J., has been filed as item II, B, of Appendix to Petitioners' Motion, supra.

to appeal the District Court's order or, in the alternative, for a writ of mandamus or prohibition; a copy of that petition has been filed as item I of the Appendix to Petitioners' Motion, supra. On April 12, 1977 the Court of Appeals heard oral argument and ordered that a writ of mandamus issue. Consequently, the substitute charge to the jury was not given. The jury has continued to examine the evidence and to deliberate with the objective of arriving at a unanimous verdict. By their Petition in this Court, the Petitioners seek to overturn the well-reasoned opinion and proper order of the Court of Appeals. See Exhibit B of Petition.

ARGUMENT

THE GRANTING OF THE WRIT OF MANDAMUS BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WAS WITHIN ITS AUTHORITY AND WAS MANDATED BY THE EXTRAORDINARY CIRCUMSTANCES

The granting of a writ of mandamus, like equitable remedies, has long been held to lie within sound judicial discretion. The relevant test of the propriety of mandamus has been consistently held to be whether the granting or withholding of the writ was appropriate in light of all of the circumstances. La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25-26 (1943).

One situation in which mandamus is clearly appropriate is where there is a need to prevent abuse of discretion by a lower court. Mandamus is used not to control the decision of the lower court "but rather merely to confine the

lower court to the sphere of its discretionary power." Will v. United States, 389 U.S. 90, 104 (1967). Under this standard, a writ is appropriately issued in extraordinary cases where there is a "usurpation of judicial power" or "a clear abuse of discretion." Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). A writ of mandamus is proper even if the order of the lower court is not final. Justice Black observed in Will v. United States, supra:

> And I also realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means "final" and thus appealable under federal statutes. Finality, then, while relevant to the right of appeal, is not determinative of the question when to issue mandamus. Rather than hinging on this abstruse and infinitely uncertain term, the issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an order. 389 U.S. at 108 (concurring opinion).

It is respectfully submitted that the instant case presented the Court of Appeals with exceptional circumstances quite sufficient to justify the issuance of a writ of mandamus. The Court of Appeals recognized that the petition for a writ of mandamus set forth very exceptional circumstances as when, for example, the Court characterized the District Court's order of April 7, 1977 as an "extraordinary and unusual action." Exhibit B to Petition, at 2.

A second rationale for the use of mandamus is based on the responsibility of the courts of appeals to supervise

the district courts within the respective circuits. This Court has specifically recognized the responsibility of the courts of appeals to ensure the proper administration of justice in the federal courts. La Buy v. Howes Leather Co., 352 U.S. 249, 259-60 (1957). In Will v. United States, 389 U.S. 90 (1967), on which Petitioners place mistaken reliance, this Court recognized that had there been evidence that the deliberate disregard of federal criminal rules would be seriously disruptive of the efficient administration of justice in the district court, mandamus might well have been appropriate. 389 U.S. at 104-05.

In Will v. United States, supra, the Court of Appeals initially refused to issue a writ of mandamus, but then reversed its ruling and issued a writ without an opinion outlining any rationale. This is obviously not true in the instant case. Although Petitioners have described the United States Court of Appeals for the Second Circuit as having acted "cavalierly, on a hurry-up basis," Petition at 13, and giving the matter only "hurried, limited consideration," Petition at 10, review of the Court of Appeals' decision reveals a thorough understanding of what was actually occuring in the District Court and the need for the use of mandamus. See Exhibit B of Petition.

Because of the novelty of the District Court's decision allowing a five-sixths verdict in a federal action, the lower court certified the question pursuant to 28 U.S.C. §1292(b) for expedited appeal to the Court of Appeals. Certificate of Hon. Henry F. Werker, U.S.D.J., filed as item II, B, of Appendix to Petitioners' Motion, supra. The Court of

Appeals, upon review of the papers filed on the petition for interlocutory review and, in the alternative, for an appropriate writ, recognized the magnitude of the District Court's error and its far-reaching implications. After due deliberation, the Court of Appeals decided to issue a writ of mandamus rather than to respond to the certified question. See Exhibit B of Petition.

The opinion of the Court of Appeals demonstrates beyond peradventure that this is not a case where there issued a writ of "mandamus from the blue without rationale." See Will v. United States, 389 U.S. 90, 107 (1967)(Black, J., concurring). The Court of Appeals clearly grounded its decision to issue a writ of mandamus on two accepted bases: the District Court's gross abuse of discretion and the need to ensure orderly judicial functioning of the inferior courts within the Court of Appeals' jurisdiction. Exhibit B of Petition.

The Court of Appeals recognized that, regardless of the ultimate determination of the issue of jury unanimity, the abolition of that requirement after a main charge and a modified Allen charge requiring unanimity had been given, and after ten days of deliberation pursuant to those charges, was nothing more than "an expedient to extract a verdict at any cost." Exhibit B of Petition, at 2. As such, the District Court's action was an abuse of its discretion. Exhibit B of Petition, at 2. The Court of Appeals also noted that this unprecedented action was being taken in the face of indications that perhaps only a single hold-out survived the delivery of the modified Allen charge. The Court of Appeals viewed the proposed

substitute charge "as endangering the integrity of the jury function and the sanctity of deliberations once begun." Exhibit B of Petition, at 3. Either of the explicitly enumerated abuses of the District Court's discretion plainly called for a writ of mandamus.

Another rationale on which the Court of Appeals' decision was based is the need to prevent chaotic and arbitrary decisions by the several district courts of the Second Circuit. The Court of Appeals stated:

> It would be anomalous to observe one district court judge permitting a 5/6 verdict in pendent state claim cases or diversity of citizenship cases while all other judges required unanimity under similar circumstances for a verdict. Exhibit B of Petition, at 3.

Colgrove v. Battin, 413 U.S. 149 (1973), upon which Petitioners place much reliance involved a local district court rule which permitted a jury of six persons in civil cases. In the present case there is no local rule with respect to the requirement of unanimity. In effect the local district judge is making his own rule. Even assuming that a provision for a less than unanimous verdict were a proper subject for a local rule, it would take the majority of the district court judges sitting in a particular district and acting in accordance with their interstitial rulemaking powers to change or effect a local rule. A district judge, acting alone, has no authority in this area. See id., at 168 (Marshall, J., dissenting). Such an action could not be and was not sanctioned by the Court of Appeals and should not be sanctioned by this Court. Thus it is clear that the Court of Appeals was completely justified, under the circumstances, in issuing a writ of mandamus.

Petitioners have repeatedly asserted that they will be prejudiced by not having the five-sixths charge given because, even if ultimately sustained on appeal, once the jury is discharged, the instruction could not be given absent a new trial. This overlooks the fact that petitioners could have made their motion at any point during the trial prior to the time the jury was charged. If denied, an interlocutory appeal could then have been taken without the pressures necessarily attendant during jury deliberations. In short, if the petitioners had made a timely motion, they themselves could have averted the "prejudice" they now claim.

All parties and the District Court proceeded through trial on the understanding that a unanimous jury would be required for a verdict. The jury was repeatedly so charged. To change the instructions at this time so as to tell the jury a less than unanimous verdict can be returned on the common-law claims, but unanimity is still required on the federal allegations, would invite compounded confusion in the minds of jurors already laboring under a voluminous and complicated charge. The potential prejudice in such a situation is rife. Such prejudice was recognized by the main authority cited by petitioners for their extreme proposition and the five-sixths charge was rejected for that very reason. Wieser v. Chrysler Motors Corp., 69 F.R.D. 97, 101 (E.D.N.Y. 1975).

Although a petition for certiorari is not the appropriate vehicle for arguing the merits (see Petition at 11-12), Petitioners nevertheless contend that substantial authority supports the District Court's position. That is totally inaccurate. The District Court's decision was, as

Petitioners have aptly described it, nothing more than an "imaginative attempt . . . to salvage a verdict from a six-and-one-half month trial." Petition at 12. Although ostensibly premised on the "Erie doctrine as explained and expanded by Hanna and Byrd," Exhibit A of Petition at 3, the District Court's opinion merely adopted the narrow outcome determination test as originally expounded in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), which was significantly restricted and modified in Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537-38 (1958). Thus to contend, as Petitioners do, that the District Court's decision accords with prior decisions of this Court is patently an error of oversimplification and oversight.

Petitioners also cite two decisions of this Court, Apodaca v. Oregon, 406 U.S. 404 (1972), and Johnson v. Louisiana, 406 U.S. 356 (1972), as support for the position that jury unanimity is no longer required in federal courts. This is misleading because in both of the cited decisions rendered in companion cases, a majority of this Court made it clear that unanimity is still required by the Sixth Amendment to the United States Constitution in all federal criminal cases. See Johnson v. Louisiana, 406 U.S. 356, 395 (Brennan, J., dissenting). Apodaca v. Oregon, supra, and Johnson v. Louisiana, supra, simply do not support the radical proposition that unanimity is no longer required by the Seventh Amendment in federal civil cases.

CONCLUSION

In view of the District Court's misconception of the Erie-Byrd-Hanna doctrine; the abrupt departure from the

traditional constitutional requirement of jury unanimity; the likely, resultant prejudice to Respondents; and all the extraordinary circumstances presented by this case, the Court of Appeals for the Second Circuit was fully justified in issuing a writ of mandamus. It is, therefore, respectfully submitted, and Empire prays, that the Petition should be denied by this Court.

Respectfully submitted,

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April 20, 1977

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IN THE

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OCTOBER TERM, 1976

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Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF RESPONDENT ARTHUR ANDERSEN & CO. SUGGESTING THAT THE CAUSE IS MOOT

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF RESPONDENT ARTHUR ANDERSEN & CO. SUGGESTING THAT THE CAUSE IS MOOT

The respondent Arthur Andersen & Co. ("Andersen") in the above-entitled case files this memorandum to advise the Court of certain facts which in the respondent's view render this cause moot.

The question which petitioners seek to raise in their application is the following: Did the Second Circuit properly exercise its discretion in issuing a Writ of Mandamus which prohibited the District Court from giving a supplementary jury instruction permitting a 5/6 verdict on the pendant state law claims?

On April 26, 1977 the jury in this case returned a verdict with respect to defendants Herman L. Meckler and Empire

National Bank who are respondents in this action. The jury found by a unanimous vote that respondent Meckler was not liable to the plaintiffs and respondent Empire National Bank was liable. (See Appendix, A3)

With respect to respondent Andersen the Court polled the jury to determine how they stood. The jury indicated it was divided 4 to 2 in favor of plaintiffs. (See Appendix, A4) Subsequently, the jury was discharged.

It is therefore apparent that the basic underlying issue of whether a 5/6 jury verdict would have been appropriate is no longer relevant to this case. Not only has the jury been discharged but with respect to respondent Andersen the vote was 4 to 2.

For these reasons Andersen suggests that the issue sought to be raised is moot as to the respondent Andersen as well as the other respondents and that the petition for certiorari should be dismissed on that ground.

Respectfully submitted,

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APPENDIX

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, et al.

vs.

ARTHUR ANDERSEN & Co., et al.

71 Civ. 4036

April 26, 1977
9:20 a.m.

(At 9:20 a.m. the jury returned to the jury room to continue their deliberations.)

(At 10:40 a.m. a note was received from the jury.)

(Note marked Court Exhibit 55.)

(The note reads:

"Your Honor:

"We have the verdict written out.")

(In open court. Jury absent.)

The Court: Good morning.

Mr. Stichter: Just one small point, your Honor.

I gather that except for accepting the verdict with respect to the other two defendants, all you intend to do vis-a-vis Andersen is to ask them whether in their opinion further deliberations would enable them to reach a unanimous verdict.

The Court: Two questions.

Mr. Stichter: You do not intend to poll them on how their vote stands on Andersen at the moment?

The Court: No, not at all.

Mr. Liebhafsky: If your Honor please, if your Honor after asking the question your Honor intends to ask receives an answer to the effect or which satisfies your Honor that there's no reasonable warrant or justification for sending them back for further deliberations for una-

nimity and, therefore, your Honor reaches a judgment to discharge the jury, I would ask that if your Honor has once made that determination, that then your Honor poll the jury as to how they stand on Andersen's liability.

Mr. Stichter: Obviously—

Mr. Liebhafsky: I don't think your Honor is precluded by the mandamus order from doing that.

Mr. Stichter: Obviously I would object to any kind of a poll.

You may recall in your Honor's own charge way back the first day before the deliberations you told them that they should not indicate how their vote stands at any time. I think the same thing holds true now.

Obviously what plaintiffs are trying to do is to take advantage if they could of a five to one verdict in the event that the Supreme Court of the United States finally decides to reverse itself.

The Court: Not reverse itself.

Mr. Stichter: To reverse the Court of Appeals, let me put it that way. I would certainly object to such a procedure.

Mr. Liebhafsky: Your Honor, I think—

The Court: Under these peculiar circumstances, Mr. Stichter, your objection is noted on the record.

Under these peculiar circumstances I would grant Mr. Liebhafsky's request after we have gotten the whole verdict.

All right, let's get the jury in.

(Jury present.)

The Court: Good morning, ladies and gentlemen.

By the Court:

Q. Now, I'm going to ask you a couple of questions with respect to your apparent and disclosed disagreement with respect to the claim against Arthur Andersen and I will ask each of you two questions.

Number one, are you in disagreement with respect to that claim and, number two, is it your opinion that further deliberations with respect to that claim would not result in a verdict?

Juror No. 1, will you tell me what your answers would be to those two questions.

A. Could you repeat the first question, your Honor?

Q. The question is:

Are you now in disagreement with respect to that claim? A. Yes.

Q. Against Arthur Andersen? A. Yes.

Q. In your opinion, would further deliberations result in a verdict in that? A. My opinion is that it would not.

Q. All right. Juror No. 2? A. I say the same.

Q. Juror No. 3? A. The same.

Q. Juror No. 4? A. The same.

Q. Juror No. 5? A. The same opinion.

Q. Juror No. 6? A. The same.

Q. Have you reached a verdict with respect to the other defendants? A. (The Forelady) Yes, we have.

Q. You have written it out? A. Yes.

Q. Will you tell us what that verdict is? A. We find for plaintiffs against Empire in the amount of $2,700,000 and with pre-judgment interest from September 1, 1970 and in favor of Meckler against plaintiffs. Verdict for Meckler on Empire's cross claim and we are deadlocked on Andersen.

Q. And that is your verdict? A. That is our verdict.

Q. Juror No. 2, is that your verdict? A. Yes.

Q. Juror No. 3? A. Yes, your Honor.

Q. Juror No. 4? A. Yes.

Q. Juror No. 5? A. That's my verdict, your Honor.

Q. Juror No. 6? A. Yes.

Q. All right.

Now, I will ask you also with respect to Andersen, although I have indicated to you earlier on that I would not

ask you this question and that you should not disclose it, I will ask each juror whether they were in favor of a verdict against Andersen or not.

Juror No. 1? A. I was in favor of a verdict against Andersen.

Q. Juror No. 2? A. No.

Q. Juror No. 3? A. Against.

Q. Juror No. 4? A. Against.

Q. Juror No. 5? A. I was in favor of a verdict for Andersen.

Q. Juror No. 6? A. Against.

Q. I didn't quite understand Juror No. 2's answer.

You were in favor of a verdict against Andersen or for Andersen? A. I was for Andersen.

The Court: All right. Fine.

Now, ladies and gentlemen, you have had a long time listening to the evidence in this case and you have had a long time deliberating in the case.

I would be remiss in my duty if I didn't say that I was proud of your performance throughout the whole seven months that you have been here. I recognize that it was a matter of personal sacrifice for many of you. I'm sure that counsel for both sides, whether they be winners or losers, would express the same opinion.

Gentlemen, if you have anything to say, I will give you an opportunity at this time.

Mr. Liebhafsky: On behalf of the plaintiffs, we would join your Honor in thanking the jury for their remarkable service.

Mr. Marshall: On behalf of Mr. Meckler, I, too, thank you all.

Mr. Stichter: We, too, thank you for your tremendous devotion to your duty.

Mr. Alcorn: Also Empire National Bank would thank the jury for their long endurance even though the verdict is against us. Congratulations on doing your duty.

Mr. Goldman: I would go beyond saying you have done your duty and thank you for the tremendous efforts you have made to resolve these claims. I really think after seven months you have gone beyond the call of duty.

Mr. Meyerson: Thank you very much, all of you. It's been a long time and now if we see each other on the subways, I would like to say hello.

The Court: I would say this to you:

You need not discuss this matter with anyone, but that is a matter of personal choice on your part, but you need not do so.

All right. With that you are discharged with the thanks of the Court.

(Jury excused.)

Mr. Stichter: Your Honor, we will be filing a formal motion which I think is really a matter of form at this point. But in accordance with Rule 50B of the Federal Rules of Civil Procedure, they not having reached a verdict as to Andersen, we would ask for a judgment in accordance with our motion for a directed verdict which we made both at the end of the plaintiffs' case and at the end of the entire evidence.

Mr. Alcorn: Your Honor, Empire National Bank will also be filing formal motions.

For the purpose of the record, however, I would say that Empire National Bank moves for a judgment in its favor, notwithstanding the verdict. We move to have the judgment entered in accordance with Empire National Bank's motion for a directed verdict. If your Honor denies that, we would ask for a new trial and make a formal motion along that line.

We would also move for a stay of the entry of a judgment due to the fact that all of the claims have not been adjudicated.

Mr. Goldman: Although we will be filing formal motion papers, I would like to make one oral motion for a judg-

ment dismissing the third party claim against Aristocrat Angus on the basis of point 4 of your charge which appears at pages 13,991 and 992 of the record in which you said:

"In the event that Andersen is not one of the defendants against whom you found a verdict, then Andersen's third party complaint against Empire, Meckler, Bonura, Aristocrat and the Dick Estate must fail and your verdict must be verdict for third party defendants, et cetera."

On that basis I would ask that you enter judgment dismissing the claim against the third party defendants. In the event that you decline to do so at this time, we will move on formal papers within the ten-day limit.

Mr. Stichter: I noticed that this morning when I was reviewing the form of jury verdict, and obviously that charge was predicated on the assumption that they would return a verdict as to Andersen, not having reached a verdict, that just simply doesn't apply.

The Court: Yes. I think it certainly contains the assumption that a verdict would be returned in favor of Andersen rather than against Andersen.

Mr. Stichter: This doesn't take into consideration the possibility at all of what has actually happened, no verdict at all.

The Court: Exactly, there is no verdict.

Mr. Liebhafsky: With respect to Empire's request that entry of judgment be deferred, I would like to have some time to think about our position on that and whether or not to make a motion before your Honor under Rule 54B for immediate entry of judgment. I think there may be considerations on both sides of that as to whether or not judgment should be entered at this time, and I think it is a complicated matter that should be studied a little bit before we make a motion.

Mr. Marshall: Judge, I will be very brief for a change.

Given the jury's verdict, I think a judgment should be entered forthwith in favor of Mr. Meckler under Rule 54B. I doubt that plaintiffs would have any objection to that.

Mr. Liebhafsky: Excuse me. That one I want to take a look at, too. I don't know if you can do it for one defendant but not for the other in this situation. I just don't know.

Assuming there's no problem of that kind, then I would, of course, consent to it.

Mr. Marshall: I think Rule 54—

The Court: They all have to stand on their own feet. I don't think there's any problem with entering a judgment with respect to one defendant and not with respect to another.

Mr. Liebhafsky: Assuming that's the law, your Honor, we, of course, would have no problem with it.

Mr. Meyerson: Your Honor, I talked to my client last night and told him what was going on. Again he said if there was any possible way to get a verdict, to do it. This is the most disastrous. What it means, in effect, in a practical way, is that he's liable. It's either to give into a default judgment next time around or to appear pro se.

He couldn't even afford to appear pro se because he couldn't afford the time to be here except possibly for an opening, a closing and for his own testimony. So, in effect, by not reaching a verdict, it is a verdict of liability.

Since the verdict was in favor of Meckler and since Mr. Bonura—although it's shaped in the complaint in terms of aiding and abetting Black Watch, I think there's little doubt here that it either had to be aiding and abetting Meckler or aiding and abetting Dick. Most of the evidence against Bonura was aiding and abetting Meckler as head of Black Watch.

The only evidence that touched on Dick was Mr. Dunn's testimony with reference to the invoices, and further Mr. Dunn's testimony, number one, he said very clearly that

the invoices he typed were destroyed and that what he was asked to write on it, he doesn't remember what it was.

So that he couldn't say that what he was asked to write on the invoices were false invoices such as we had here. He couldn't even say that.

He said he had something to do with the blank invoice, but he didn't remember what it was. Whatever it was was destroyed. So it didn't have anything to do with this trial.

Moreover, my last question to him, he said possibly—his memory was cloudy and possibly it was not even Mr. Bonura who gave it to him. That was the only reference to aiding and abetting Mr. Dick.

As far as the reference to Dick—

The Court: Mr. Meyerson, I would like to say the trial is over. Referring to the testimony now is really outside of our business at the moment. You like anyone else have a right to make a motion for a directed verdict, renew your motion under the rule.

Mr. Meyerson: I will do that in writing, then, your Honor.

Mr. Liebhafsky: It just occurred to me, your Honor. I don't know whether there was anything further written down other than what the forelady said. I don't believe they complied with instructions in returning separate verdicts on the '68 and '69 transactions, the securities law versus common law, et cetera. I don't know whether we ought to take any action on that.

The Court: I don't think we should take any action on that. It is a unanimous verdict.

Mr. Liebhafsky: There may be questions in the future as to just what the verdict relates to.

Mr. Alcorn: I would say, your Honor, there will be questions in the future as to what the verdict relates to.

The Court: All right. See if the jury is still there.

(Pause.)

The Court: That's it then.

Mr. Marshall: Your Honor, it occurs to me that the jurors had nothing to say with respect to third party claims. I think it is obvious from your Honor's charge that if they found in favor of a particular defendant, then they must also find in favor of that defendant on any cross claims or third party claims.

I would, therefore, ask that your Honor direct a verdict in Mr. Meckler's favor with respect to all cross claims and third party claims although, frankly, I don't know that a direction from your Honor is necessary since I believe that a verdict in his favor obviously embodies within it a finding that he is not liable with respect to or to any other defendant for contribution.

The Court: I think that was said in my charge to the jury. From the standpoint of the plaintiff, if Meckler was not found liable, then Meckler could not be found liable to anyone else because the third party responsibility was predicated upon some action having been done which was detrimental to the plaintiff.

Mr. Marshall: Exactly. I only raise it out of an abundance of caution because your Honor had listed seven steps.

I see that the jury really came to the heart of the matter and then stopped. But I will ask that a judgment be entered with respect to both the cross claims and the third party claims.

The Court: I see no reason why that can't be done.

Mr. Marshall: Thank you, your Honor.

Mr. Alcorn: Your Honor, I just have one housekeeping matter. I'm not sure this was marked as a Court's Exhibit or that it was not. But you had a note from Mrs. Kennedy relating to her departure time. You came back in and straightened out the record as to when she was leaving. I would ask on behalf of Empire National Bank that that note be marked as a Court's Exhibit if it has not been done.

The Court: No problem.

Mr. Alcorn: Thank you.

The Court: Gentlemen, I would like to complement all of you. I am going to reserve on these motions. I think they should be submitted on papers for a complete record.

I want to complement you on your ability and your competency in the course of this long trial and also for your exhibition of temperament of the right kind.

With that I would bid you good day unless you have something else to say to me.

Mr. Marshall: I think all counsel will join with me, your Honor, when I thank you for making the last seven months very tolerable for all of us. We appreciate your kindness towards us.

The Court: All right.

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1420

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY and THE BEACON MUTUAL INDEMNITY COMPANY,

Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Of Counsel

April 21, 1977

In the

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October Term, 1976

No. 76-1420

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PETITIONERS' REPLY MEMORANDUM

While respondents Arthur Andersen & Co. and Herman L. Meckler, in their joint Brief in Opposition to the Petition, cite this Court's recent decision in Kerr v. United States District Court, 426 U.S. 394 (1976), they fail to cite the crucial language on the dispositive issue herein:

> As a means of implementing the rule that the writ [of mandamus] will issue only in extraordinary circumstances, we have set forth various conditions to its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the

relief he desires, Roche v. Evaporated Milk Assn., 319 U.S. [21], at 26 [(1943), cited in Petition, pp. 7-8] . . . .

— 426 U.S. at 403
(emphasis added)

In Kerr, this Court affirmed the Court of Appeals' denial of the writ, specifically on the ground that the petitioners there had available to them "an alternative, less extreme, path" to the relief they sought. 426 U.S. at 396.

It is even clearer here that the present respondents are not in the position of having "no other adequate means to attain the relief" they desire; if an adverse verdict is returned, it may be reviewed by the Court of Appeals in the usual course in a matter of weeks or months.* Thus Kerr, far from supporting the respondents' position, dictates the reversal of the Court of Appeals' action which petitioners seek.

* This fact also distinguishes other cases relied on by respondents, including Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976); Schlagenhauf v. Holder, 379 U.S. 104 (1964); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); and United States v. Newman, No. 76-3077 (2d Cir. Jan. 25, 1977), since in each of these cases, regular appellate review of the trial judge's challenged action was either totally unavailable or available only far in the future.

Respondent Empire National Bank, in its Brief in Opposition, makes various speculative claims that it will be "prejudiced" if the Court of Appeals is reversed. These assertions are entitled to no weight at all in the present posture of the case. For they are premised on the inadmissible assumption that the trial judge — who has lived with this jury during six-and-one-half months of trial — will not couch the proposed five-sixths charge in appropriate language to prevent confusion or "prejudice."* Although the fact my be obvious, it bears emphasis that the charge has not yet been given: therefore no-one — not respondents, not the Court of Appeals** — knows exactly what the trial judge will say.

This Court has expressed its confidence in the ability of District Judges to gauge the impact of a

* The trial judge has specifically indicated on the record his awareness of the need to couch the charge in non-"coercive" language. See Trial Tr., p. 14123 (in part II of the Appendix to Petitioners' Motion for Expedited Consideration).

** The Court of Appeal's vituperative statement that the trial judge proposes to adopt an "expedient" to "extract a verdict at any cost" — seized on by respondents in their Briefs — thus simply has no basis in the record. See Petition, pp. 12-13.

charge on a jury, and its doubts about the wisdom of a Court of Appeals substituting its judgment on such a matter which is "certainly more evident in the living scene than in a cold record" — even when the Court of Appeals had acted on a full record after verdict. United States v. Bayer, 331 U.S. 532, 536-37 (1947); see United States v. Park, 421 U.S. 658, 674-76 (1975); cf. Illinois v. Somerville, 410 U.S. 458, 462-64 (1973). A fortiori, the Court of Appeals' intrusion into an as-yet uncompleted trial here, to strike down an as-yet undelivered charge, cannot be justified.

This Court, in the exercise of its supervisory powers over the inferior federal courts, and to protect its own jurisdiction in this case (see Petition, p. 10), must act now to confine the Court of Appeals to its very limited jurisdiction under 28 U.S.C. § 1651(a) by reversing forthwith that Court's hasty

and unjustifiable issuance of the extraordinary writ of mandamus.

Respectfully submitted,

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